to the alleged difference between what ASP Fariddudin had testified previously and now he will have to decide if it is material. For this purpose, the chemist could be recalled to ascertain whether there is a material difference between the words 'opium' and 'an opiate'. It should be noted that the provisions as to the presumptions and penalties under the Dangerous Drugs Act, 1952, for opium and heroin can be very different, depending on the quantity of drugs involved.

If the difference is found to be material, then leave to cross-examine should be given and the procedure laid down by Taylor J. in the oft quoted case of *Muthusamy* v. *Public Prosecutor*[5] followed.

It is clear from the record provided that the only explanation offered by ASP Fariddudin is a denial that he used the word 'opium' at the original trial. So all that needs to be done is to put in the record at the original trial by calling the proper officer of the Court who has custody of the same, presumably, the Registrar, Sessions Court.

After I had explained to counsel what I thought was the legal position, as outlined above, he asked that no order be made on his application and I acceded to his request.

I have a final point to make. Section 121 of the Act is based on general grounds of convenience and public policy. Obviously, it would cause great inconvenience and perhaps, embarrassment, if Magistrates or Presidents are withdrawn from their own Courts to answer questions as to their own conduct at trials at which they have presided. It follows that it is only in altogether exceptional circumstances that a Special Order will be made under the section and that too only when it appears essential to the just decision of a case.

Ruled accordingly.

Solicitors : *Karpal Singh & Co.*

UNITED MALAYAN BANKING CORPORATION BHD. v. OFFICIAL RECEIVER AND LIQUIDATOR OF SOON HUP SENG SDN. BHD. (IN LIQUIDATION) & ANOR.

[O.C.J. (Shankar J.) May 28, 1985]

[Johore Bahru – Originating Summons No. 378 of 1983]

Company Law - Floating charge on movable and immovable property – Charge crystallises when receiver is appointed – Winding up of company – Secured debenture holder has priority over unsecured creditors – Commencement of winding up – Attachment in execution in force against company becomes void – Prohibitory Order – Companies Act, 1965, ss. 108, 223, 224 & 292.

Power of Attorney – Power given to debenture holder to appoint receiver to act in the name of the company – Registration required – Powers of Attorney Ordinance, 1949, s. 4.

In this case Soon Hup Seng Sdn. Bhd. (Company in liquidation) borrowed $154,000 and $35,000 from United Malayan Banking Corporation Bhd. on security of land by creating a first and second charge on that land. Later the company executed a debenture to borrow another $100,000 from the bank by way of floating charge on all its movable and immovable properties with power to appoint a receiver under certain contingencies. The charges were duly registered under the Companies Act and the National Land Code. Meanwhile a creditor of the company M/s Sin Min Auto (Pte.) Ltd. obtained a decree against the company for $41,328.77 with costs. The judgment creditor took proceedings by way of attachment in execution and obtained a prohibitory order against the said land in April 1982. The said prohibitory order was extended from time to time. On January 8, 1983, the bank appointed a receiver of the company's properties. The receiver's attempts to sell the land were aborted because of the prohibitory order obtained by the creditor. On January 24, 1983, the creditor filed a winding up petition against the company which was ordered to be wound up on June 29, 1983.

The creditor also raised the following contentions:

(1) On winding up of the company the properties of the company vested in the Liquidator and the Receiver could not sell any property without the leave of the Court.

(2) If the Bank claimed on the basis of the floating charge it could claim only $100,000 and not as holder of first and second charge on land.

(3) Receiver cannot act in the name of the company as no power of attorney had been registered under the Powers of Attorney Ordinance, 1949.

The Bank applied to the court for directions by way of an Originating Summons.

Held: (1) the bank should register the power of attorney under the Powers of Attorney Ordinance, 1949;

(2) the bank could sell the land and recover moneys

due on the first and second charge as also under the debenture after first satisfying preferential payments, if any;

(3) the balance, if any, should be paid to the liquidator.

Cases referred to:

(1) *Haw Par Bros. International Ltd.* v. *Overseas Textiles Co. Ltd.* [1978] 2 M.L.J. 19.
(2) *In re Opera Ltd.* [1891]3 Ch. 260.
(3) *Sowman & Ors.* v. *David Samuel Trust Ltd. & Anor.* [1978]1 All E.R. 616.
(4) *Gosling* v. *Gaskell* [1897] A.C. 575.
(5) *Thomas* v. *Todd* [1926]2 K.B. 511.
(6) *Gough's Garages* v. *Pugsley* [1930] 1 K.B. 615, 626.
(7) *Zeno Limited* v. *Prefabricated Construction Co. (Malaya) Ltd. & Anor.* [1967]2 M.L.J. 104.
(8) *Paramoo* v. *Zeno Ltd.* [1968] 2 M.L.J. 230.
(9) *Re Pan (M) Industries Ltd.* [1979]1 M.L.J. 19.

ORIGINATING SUMMONS.

Tan Kiah Teck for plaintiffs.
L.M. Ong for second defendants.
Wong Thiam Seng (Assistant Official Assignee) for Official Liquidator.

Cur. Adv. Vult.

Shankar J. : What is the position of a Receiver under a debenture, whose appointment is followed by a winding up order of the Company? Does he then require the leave of the Court to dispose of the Company's assets especially if the assets in question include land which is not specifically described in the debenture? What if the land is the subject of a collateral charge under the National Land Code? Assuming that he can unilaterally dispose of the land, how is the Receiver to distribute the proceeds of the sale? Can he pay off the moneys secured under the charge without making a separate application under the National Land Code? What are the mechanics by which the Receiver may pass title to a purchaser? These are some of the vexed questions which have arisen in this case.

The history of the matter is as follows.

Soon Hup Seng Sdn. Bhd. (who are hereafter referred to as the Company) were customers of the United Malayan Banking Corporation Bhd. Johore Bahru (hereafter referred to as the Bank.) In April 1980 the Company charged its land covered by the title Hs(d) 23624 for Lot PTB 8636 in the town of Johore Bahru (hereafter referred to as the said land) to the Bank for a term loan of $154,000. The same day the Company executed a second charge over the said land in favour of the Bank to secure an overdraft of $35,000. These two charges (hereafter referred to as the 1st Charge and 2nd Charge respectively) were both registered with the Registrar of Companies under the provisions of the Companies Act 1965 (hereafter referred to as the Act) and with the Registrar of Titles under the provisions of the National Land Code (hereafter referred to as the Code).

On November 29, 1980 the Company executed a debenture in favour of the Bank to secure a further loan of $100,000/-. This debenture was registered with the Registrar of Companies on February 3, 1981, and is hereafter referred to as "the Debenture".

By Clause 2 of the Debenture, the Company charged for this loan and by way of a first fixed charge, all its machinery and plants as listed in the Schedule thereto and by way of a floating charge, its books debts undertaking and all its property including uncalled capital, goodwill, machinery, plant and all other assets, moveable and inmmoveble of the Company. In the event of any immoveable property being thereafter acquired by the Company, the Company immediately the same was acquired was to execute a registrable mortgage or charge thereon as collateral security for the moneys thereby secured and cause the same to be registered. The plants and machinery listed in the Schedule were valued at $64,821.88 as assessed on March 18, 1980 in the Company's books. The said land was not separately listed in the Schedule.

The other relevant Clauses in the Debenture read as follows:

"9. The principal moneys hereby secured shall become immediately payable:

(a) On demand being made by the Bank.

(b) If an Order is made . . . for the winding up of the Company.

(c) If a distress or execution is levied . . . against any of the . . . property of the Company and is not paid out or discharged within five days.

(d) If a Receiver is appointed of the undertaking of the Company or any of its property or assets.

(e) If the Company stops payment or ceases or threatens to cease to carry on its business.

And upon the moneys hereby secured becoming immediately payable the Bank may by writing under the hand of the Manager .... appoint any person ... to be Receiver of the property subject to the charge hereby created and may in like manner from time to time remove any Receiver so appointed and appoint another in his stead.

10. A Receiver so appointed shall be the agent of the Company and shall have power:

(i) To take possession of and get in the property hereby charged.

(ii) To sell or concur in selling any of the property hereby charged.

(iii) To make any arrangement or compromise which he shall think expedient.

11. The net proceeds of the said land or any other moneys collected by the Receiver shall be applied by the Receiver subject to the claims of all secured creditors (if any) ranking in priority to this Debenture:

First in payment of all costs charges and expenses of and incidental to the appointment of the Receiver . . . including reasonable remuneration . . . and . . . outgoings . . .

Secondly in or towards payment to the Bank of all interest remaining unpaid in respect of the said balance.

Thirdly in or towards payment to the Bank of all principal moneys due in respect of the said balance.

13. The Company hereby irrevocably appoints the Bank to be the attorney of the Company and in the name and on behalf of the Company to execute and to do any assurances and things which the Company ought to execute and do under the covenants herein contained and generally to use the name of the Company in the exercise of all or any of the powers conferred on the Bank or any Receiver appointed by them with power for the Bank to substitute the Receiver for the time being in their place and stead to be the attorney of the Company.

18. This Debenture shall be without prejudice to any security already given by the Company to the Bank or any security which may hereafter be given to the Bank whether the same be for securing repayment of the principal money and interest hereby secured or any part thereof or any other money covenanted to be paid herein and whether such security is taken as additional or collateral security or otherwise howsoever.

20. The Security herein created is expressly intended to be and shall be a continuing security for all moneys whatsoever now or hereafter from time to time owing to the Bank by the Company whether alone or jointly and severally with another or others and whether as principal or surety notwithstanding that the Company may at any time or times cease to be indebted to the Bank for any period or periods and notwithstanding that the account of the Company with the Bank may from any cause whatsoever cease to be a current account or accounts and notwithstanding any settlement of account or accounts or otherwise."

Sin Min Auto Co. (Pte.) Ltd. (hereafter referred to as Sin Min) had been supplying goods to the Company. On November 24, 1981 they obtained final judgment against the Company for $41,328.77 and costs. Allegedly to prevent the Company from putting the land out of the reach of its creditors they took proceedings against the Company by way of attachment in execution and obtained a prohibitory order against the said land on April 19, 1982.

Tan & Tan were the solicitors for the Bank. Sin Min's solicitors had written to them on May 4, 1982 for particulars of the securities held by the Bank. They replied on April 17, giving details of the 1st and 2nd Charges and the Debenture. The Bank's Solicitors claimed that as secured creditors, the Bank were entitled to priority in respect of the principal sum and interest covered by all 3 securities.

On June 12, 1982 Sin Min's solicitors filed a Summons for Directions in their suit against the Company. They prayed for an order that the said land, now the subject of the prohibitory order be sold by public auction, that the purchaser be entitled to receive from the Senior Assistant Registrar a Certificate of the Sale with the issue document of title, that the Bank be entitled to deliver to Sin Min's solicitors the issue document of title for this purpose and that the purchase money be applied firstly in payment of quit rent, assessment and statutory outgoings, secondly for the costs of the suit and the sale, thirdly to the Bank but only to the extent of the moneys secured by the 1st and the 2nd charges (but not the Debenture), fourthly to Sin Min, and fifthly that the balance if any be paid to the Company.

The contest between the Bank and Sin Min as to who should sell the land and how the proceeds were to be distributed could not be resolved between them.

On October 13, 1982, Sin Min's solicitors had applied and obtained an order giving them liberty to issue a writ of seizure and sale against the said land. The Bank was contesting the right of Sin Min to sell the said land whilst the dispute as to priority was still pending. They moved on two fronts.

On January 8, 1983 the Bank exercised the power conferred upon them by Clause 9 of the Debenture and appointed En. Mohamed bin Abdullah and En. Tan Hock Hin of Coopers and Lybrand to be the Receivers and Managers of the Company's properties. Further, the Bank appointed the aforesaid gentlemen to be their true and lawful substitute to execute in the name of the Bank or in the name of the Receiver any documents required to vest any properties sold by the Receivers and Managers in the purchase thereof. The Bank also made a formal application for inter-

vention in Sin Min's execution proceedings. They served this application together with the supporting affidavit on Sin Min's solicitors and notified them of the appointment of the Receivers and Managers aforesaid. On May 12, 1983 the Bank obtained an Order giving them leave to intervene in Sin Min's execution proceedings.

In the meantime, the Receiver's attempts to have the land sold, were aborted because he was completely put off by a warning by Sin Min's solicitors that since they had already filed a winding up petition on January 24, 1983, any attempt by the Receiver to sell the property must be at his own risk. In the event the Company was wound up on the June 29, 1983.

By a letter dated August 1, 1983, the Bank's solicitors wrote to Sin Min's solicitors informing them that the Bank had appointed Mr. Roland Choong as Receiver who wished to proceed with the sale of the land. Sin Min's solicitors were asked to indicate whether they agreed that in view of the winding up order the extension of the prohibitory order was null and void, and contrary to section 224 of the Companies Act 1965 (the Act). They were also asked to agree that the Debenture holder had priority.

To this Sin Min's Solicitors replied on August 15, 1983 that all the assets of the Company were vested in the liquidator appointed by the Court and that the Bank's Receiver could not therefore proceed to sell the land. They insisted that the Debenture did not rank for priority in the proceeds of the sale of the land.

In all material terms, the appointment of Mr. Roland Choong as Receiver was in the same terms as his predecessors aforesaid.

After this indication, the Bank took out his Originating Summons to determine the following questions:

1. (a) whether the Receiver was entitled to sell the land under the terms of the Debenture notwithstanding the Winding Up Order on June 29, 1983;

   (b) whether the Receiver required leave of the Court to sell the land under section 223 of the Companies Act and if so that such leave be granted;

2. that a sale of the land be conducted by an auctioneer to be appointed by the Receiver;

3. that the prohibitory order be declared void as contrary to section 224 of the Companies Act 1965 and if not that the same be vacated;

4. that the proceeds of the sale be paid to the Receiver;

5. that the Receiver do pay the proceeds of the sale after the deduction of the costs to the Bank as secured creditors under the 1st Charge, the 2nd Charge and the Debenture;

6. that the balance be paid to the liquidator;

7. that the costs of the application be taxed and paid;

8. for such further or other orders as the justice of the case required.

The Official Receiver and Liquidator and Sin Min were made defendants of this application.

Lengthy submissions were made by all parties concerned which I shall now attempt to summarise.

Mr. Tan Kiah Teck, counsel for the plaintiff rested his claim for relief on the terms of the Debenture, and the provisions of the Companies Act and common law.

His contention is that the terms of the Debenture covers not only the machinery listed but all the property of the Company. He referred to Volume VII of *Halsbury's* Laws of England 4th Edition at paragraphs 813 and 814 to show that there was no precise definition of a debenture and that debentures could contain a fixed charge and a charge by way of floating security upon the Company's property. Reference was also made to paragraph 1367 as authority for the proposition that legal proceedings by a Receiver would be allowed to continue where they are to enforce a mortgage or security upon the Company's property unless the liquidator offers to give all that the mortgagee can obtain by his proceedings. Paragraph 877 was cited to show that if the Debenture charged the property of the Company then the Debenture holder had a right to sell the property charged either under the power given in the Debenture or by Statute. Paragraphs 879 and 880 were quoted to show that the appointment of a Receiver is one of the events which cause a floating charge to crystallise. As regards all the property comprised in the security over which the Receiver is appointed, the Director's powers are of necessity paralysed from that point onwards. Whether the Receiver was acting as agent for the Debenture holder or for the Company depended upon the precise terms of his

appointment. It was pointed out that the power of the secured creditor to appoint a Receiver can be exercised after the Company has gone into liquidation.

Section 98 of the English Companies Act is similar to section 108 of the Malaysian Companies Act 1965 (the Act). Mr. Tan's contention was that once the securities were registered they became effective as against any creditor of the Company and the liquidator. Section 322 of the English Companies Act and its corresponding provision section 294 of the Act was also referred to. In this case the floating charge in the debenture was made well in excess of six months from the commencement of the winding up and was therefore not vulnerable on that ground.

As for the prohibitory order, Mr. Tan referred to section 224 of the Act:

"Any attachment ... or execution put in force against the estate or effects of the Company after the commencement of the winding-up by the Court shall be void."

He says that the prohibitory order was made under the provisions of Order 47 of the Rules of the High Court and is a form of execution. After they got their prohibitory order on April 19, 1982 Sin Min extended the sale for six months from September 13, 1982. This extension crossed the presentation of their winding up petition on January 24, 1983. Notwithstanding the winding up order which he obtained on June 29, 1983, Sin Min got a further extension of their prohibitory order to October 19, 1983 and then got a further extension up to October 19, 1984. The existence of the prohibitory order inevitably blocked the Bank and the Receiver from effecting any sale of the land so Mr. Tan wanted the prohibitory order vacated.

Section 191 of the Act was referred to. Under it, where a Receiver is appointed on behalf of the Debenture holder secured by a floating charge or possession is taken by the Debenture holder of any property comprised in a floating charge, then if the Company is not at the time in the course of being wound up, debts which in every winding up are preferential debts and are due by way of wages, salaries, vacation leave or superannuation or provident fund payment, and any amount which in a winding up is payable in pursuant of section 292(3) or (5) of the Act shall be paid out of any assets coming into the hands of the Receiver in priority to any claim for principal or interest in respect of the Debenture, and shall be paid in the same order of priority as is prescribed by that section. Section 292 was then referred to, to show that apart from the statutory priorities provided in that section the Debenture holders do have priority over other unsecured creditors for the amount which is the subject of the floating charge.

Paragraph 824 of *Halsbury* was relied upon to show that a floating charge could cover all the property of a Company, real or personal, whether present or future, and unlike a specific charge, was one which without more fastens on ascertained or definite property or property capable of being ascertained and defined. A floating charge moves with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp. Debentures given to bind a company and all its estate, property and effects, or its real and personal estate constitute a floating security.

Paragraph 827 was cited to show that if a Receiver is appointed or some events happen upon which the charge is to become a fixed charge, the securities ceases to be the floating security and becomes a fixed charge and the Company cannot thereafter deal with any part of the property so charged except subject to the charge.

In our case, Clause 9 of the Debenture provided that the principal moneys secured should become immediately payable if execution was levied against the property of the Company. The first prohibitory order obtained by Sin Min against the Company was on April 19, 1982 and it could be contended that it became a fixed charge on that day. Even if this were not so it cannot be disputed that the floating charge became a fixed charge when the Bank first appointed its Receiver on January 8, 1983.

Haw Par Bros. International Ltd. v. *Overseas Textiles Co. Ltd.*[1] was cited as an example where a Debenture holder took priority over an unsecured creditor. *In re Opera Ltd.*[2] was also referred to. As to costs Mr. Tan referred to Order 59 rules 3 and 7 of the Rules of the High Court.

The lynchpin of Mr. Tan's submission rested on the case of *Sowman and Ors.* v. *David Samuel Trust Ltd. and Anor.*[3] There the Court held that although winding up deprived the Receiver of power to bind the Company personally by acting as its agent, it did not affect his power to hold and dispose of the Company's property comprised in

the Debenture including the power to use the Company's name for that purpose and the disposition of the Company's property made in equity by the Debenture was binding on the Company and those claiming through it in the liquidation. It was also held that the power of attorney given to the Debenture holders in that case had not been revoked by the winding up.

In *Sowman's* case the Debenture holders themselves executed the conveyance in favour of the purchaser in the name of the Company by exercising the relevant power conferred upon them. The rest of the judgment sets out the argument for the Receiver himself having authority to execute the conveyance in the name of the Company, but the point was left open.

Mr. L.M. Ong's argument on behalf of Sin Min are as follows. He said that a prohibition order was obtained before the Bank appointed their Receiver and before the winding up order. Section 223 of the Act says:

"Any disposition of the property of the Company . . . made after the commencement of the winding by of the Court shall, unless the Court otherwise orders, be void."

He says the section means that even a Receiver under a valid Debenture must get leave of the Court to sell the property under the Debenture.

Order 31 rule 1 of the Rules of the High Court was referred to which empowers the Court to order the sale of moveable property where it appears necessary or expedient that the Court should make such an order. He attempted to distinguish the facts in *Sowman's* case and argued that the Receiver in that case derived his power to sell from section 101 of the English Law of Property Act 1925. He says that in England title passes to a mortgagee but that in Malaysia only remedies pass and referred to section 253 of the National Land Code which states that the provisions of Chapter 3 of the Code shall have effect for the purpose of enabling any chargee to obtain the sale of the land to which his charge relates in the event of a breach by the chargor of any of the agreement on his part, expressed or implied therein. However, section 253(2) of the Code says that the powers conferred by the Chapter are additional to those conferred by Chapter 4 and no chargee shall be debarred from exercising them by reason of the fact that he has already taken action under that chapter.

The argument is that whilst the Debenture holder can sell before a winding up, once an order is made for the winding up he must come to Court because all property vests in the Official Liquidator. Clause 10 of the Debenture says that the Receiver shall be the agent of the Company and as for Clause 13, Mr. Ong argued that the Debenture should have been registered as a power of attorney under the Powers of Attorney Ordinance 1949 (the Ordinance).

Even if the Debenture was otherwise valid, he contends that a chargee cannot sign a transfer and he must come into Court. So must the Receiver because his power as agent of the Company has terminated. He referred to *Kerr* on Receivers 15th Edition (1978) at page 351.

Mr. Ong also submitted that since the Bank had moved under the Debenture, it was only entitled to be paid $100,000/- plus interest by way of priority thereon. He left it to be implied that if the plaintiffs wished to have priority for the subject matter of the 1st and 2nd charges they should adopt some other procedure. I took this to mean that a separate application was being proposed under the provisions of the National Land Code.

As for costs, it was claimed that the prohibitory order was obtained to prevent the Company from selling away its assets.

Another line of argument was that the Receiver should get directions under section 181(3) and (4) of the Companies Act but those provisions appear to relate to remedy in case of an oppresion.

Gosling v. *Gaskell,*[4] *Thomas* v. *Tood*[5] and *Gough Garages* v. *Pugsley*[6] were relied upon to show that the Receiver proceeded to sell at his own risk if he acted as agent of the Debenture holder.

Finally, section 233(2) of the Act was relied upon to say that a vesting order was required but this section refers to the vesting of property into the hand of the liquidator after a winding up.

Mr. Wong Thiam Seng who appeared for the Official Receiver and Liquidator of the Company, conceded that under section 224 of the Act the prohibitory order was void once the winding up order was made. But he contended that the Receiver could not use the name of the Company without the consent of the liquidator, after the winding up order was made and therefore submitted that the Receiver should come to Court for a vesting order. If the sale went under the Debenture,

his contention was that only the sum of $100,000/- and interest was recoverable. If priority was to be given effect to under the 1st and 2nd charges, he contended that the Bank should proceed under the Code and said that there were no shortcuts.

In dealing with these arguments it seems to me that the first thing that must be done is to determine whether the power of attorney contained in Clause 13 of the Debenture is valid notwithstanding that it was not registered under the Powers of Attorney Ordinance 1949 (the Ordinance).

The material portions of the Ordinance which must be considered here are section 4(1) and (4) of the Ordinance which read as follows:

> "4. (1) Except as hereinafter provided no instrument purporting to create a power of attorney shall. . . have any validity to create such power . . . until
>
> (a) a true copy of the said instrument . . . has been deposited in the office of an Assistant Registrar.
>
> (4) The provisions of sub-section (1) of this section shall not apply to instruments executed and used for the sole purpose of carrying transactions in the office of the Registrar of Titles. . . .provided they are attested in accordance with any law for the time being enforced regarding the attestation of such instruments."

Clause 13 of the Debenture however was not a special power created solely to enable the bank to deal in land on the Company's behalf. It was a general power to execute every document required to give effect to the Debenture.

I must therefore hold that unless first deposited as prescribed it was ineffective to create a valid power in the Bank or its Receivers.

The object of registration, *inter alia*, is to give public notice of the creation of a right or status and thereby minimize the possibility of fraud and other unfortunate occurrences. These objects had already been achieved by the registration of the Debenture under the Companies Act with the Registrar of Companies. What useful purpose is served by an additional registration with the Registrar of the Court? The need for the deposit of powers of attorney in England have been abolished by Powers of Attorney Act 1971. Even if we do not wish to go that far there seems to be a case for bringing our Ordinance up to date by making the appropriate amendments to section 4 to dispense with the need for double registration.

Mercifully the Ordinance as it stands does not provide any time limit for depositing the instrument with the Registrar of the High Court. Once that is done, in this case, Clause 13 of the Debenture will be fully effective.

Mr. Ong's next submission is that upon the commencement of the liquidation (*i.e.*, the date of the presentation of the petition – see section 219(2) of the Act), the agency of the Receiver for the Company came to an end. But a clear distinction must be drawn between the termination of the agency and the survival of the powers of the Debenture holder, which in my view of the law, transcend and exist independently of the liquidation.

At this juncture we need to consider section 6(1) (a) of the Powers of Attorney Ordinance which reads:

> "6(1) If a power of attorney, given for valuable consideration, is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser
>
> (a) The power shall not be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death . . . or bankruptcy of the donor of the power;"

Had this Debenture been deposited under section 4 of the Ordinance (and it is still not too late to do so) it is my view that section 6(1) (a) aforesaid would have rendered the liquidation of no consequence to the validity of Clause 13 of the Debenture. That clause refers to the power of the Bank and/or the Receiver to make good title to the Company's property in the Company's name.

The *dicta* in *Salmond* v. *David Samuel Trust Ltd.* (*supra*) would then have been fully applicable to the facts of this case, and the Bank's receiver could sell the land and execute the transfer without the intervention of the Court.

Mr. Ong sought to distinguish that case by contending that a mortgagee's power of sale in England was a creature of statute by virtue of section 101 of the Law of Property Act 1925 for which there is no local equivalent. He says that therefore a mortgagee in Malaysia cannot sell without the intervention of the Court.

With respect, it seems to me that section 101 of the Law of Property Act 1925 implies a power

of sale where none already exists in specific terms in the mortgage deed. Charges under the Malaysian National Land Code do not allow the sale of land without a Court order, which can be obtained only if the prescribed procedure is followed.

Zeno Limited v. *Prefabricated Construction Co. (Malaya) Ltd. & Anor.*[7] (and on appeal *Paramoo* v. *Zeno Ltd.*[8]) was a case under the old land code where it was held that the non-registration in the land office of a charge of land made it void for all purposes notwithstanding its registration with the Registrar of Companies. Although neither party cited this authority, the parallels have caused me some anxiety.

Nevertheless, albeit with some diffidence, I hold that a Debenture is an altogether different class of document from a charge under the Code. The floating charge is in fact over unspecified property. When it crystallises it attaches itself to the Company's land as much as it does to its chattels and personalty. If the document is to be commercially effective the Debenture holder should be permitted to move with due expedition. It has not been suggested to me by Mr. Ong that once the floating charge crystallises, that part of it which attaches itself to land must be regarded as a fixed charge of land thereby requiring registration under the Code. Indeed it is difficult to envisage how that could be done. But what is being suggested is that in so far as sale is concerned the Debenture is on a par with a charge under the Code.

With respect, I am unable to follow. The power to sell under the Debenture arises by virtue of the contractual provisions of the Debenture itself. In this case Clause 10 of the Debenture is relevant. So is section 206(3) of the Code which expressly reserves the contractual operation of any transaction relating to alienating land.

In this case one need to distinguish between the power to sell (Clause 10 of the Debenture) and the mechanics of giving good title (Clause 13). The easy way out for the Bank in this case is to comply with section 4 of the Ordinance. Then all the Receiver has to do to consummate the sale is to hand over to the transferee for onward transmission to the Land Office for registration, a memorandum of transfer in the prescribed form in the Company's name to be executed by the Bank and/or the Receiver as the case may be as Attorney of the Company. Reference may be made in this context to section 309 of the National Land Code which requires the transfer to be accompanied by an office copy of the Power of Attorney.

But as the Power of Attorney in this case has not yet been validated what has to be done? The Bank and/or the Receiver, in my view, still has the power to sell, but it is with regard to the mechanics of the transfer of title that the aid of the Court has to be sought.

I was referred by Mr. Ong to *Kerr* on Receivers (15th edition) at page 351 (which does not refer to *Sowman's* case) and by Mr. Tan to the 16th edition at page 330 (which does). Those passages suggest that the Debenture holder cannot convey property in the name of the Company. The liquidator can. But the vesting order referred to in section 233(2) of the Companies Act is a vesting in the name of the liquidator, not, be it noted, in the name of the Debenture holder or its Receiver.

Section 420 of the National Land Code also provides for vesting orders but the authorities cited by Judith Sihombing in her treatise on "The National Land Code" (1981) suggest that this procedure is only to be used as a last resort.

When the object is to sell the property by public auction to a third party, it is difficult to appreciate the need for a vesting order in favour of the Receiver. If at all, it seems that it should be made in favour of the purchaser.

Here the Bank has the issue document of title and all that is required to consummate the sale is a valid registrable transfer of the property. In the circumstances of this case this objective can be easily achieved by making an order that the Bank and/or the Receiver be entitled to require the Registrar of this Court to execute on behalf of the Company any transfer which the Bank and/or the Receiver may present subject to the name of the transferee and the consideration for the sale being duly stated therein. A further order can, if need be, be made directing the Registrar of Titles – to register the transfer in favour of the purchaser. In other words the same procedure would be followed as if the sale had been conducted by the Court.

The next point which arises for determination here is the manner in which the Receiver may distribute the proceeds of the sale. It is the contention of both Mr. Ong and the Official Liquidator that all the Receiver is entitled to, is to pay off the moneys due under the Debenture alone but not the moneys due under the 1st and 2nd charges. I was completely unable to appreciate the reasoning

behind this submission or the rationale therefor. The Debenture makes it clear that it is to be a security not only for the amount lent under it but also that in the event of the realisation of the security, the proceeds should be utilised for discharge of all other moneys due to the Bank by the Company (see Clauses 11 & 20). As for these other moneys, the Bank is not an unsecured creditor but a fully secured creditor over the same asset by virtue of the 1st and 2nd Charges. With due respect to Mr. Ong and to the Official Liquidator I could not see what useful purpose would be served by going through a mindless exercise under the National Land Code by way of serving a notice of demand followed by orders for the sale of the land which by then would already have been sold in the exercise of the powers of sale contained in the Debenture.

In this context, the law is that the Bank and the Receiver should maintain proper accounts and the Bank should keep the Receiver informed of all moneys realised and proposed to be paid out in satisfaction of the debts for which priorities claimed.

At this stage of the proceedings, I have not been given any notice by the Liquidator that there are statutory priorities which should take precedence over the moneys due to the Bank and the costs. But if such be the case, some guidance may be obtained from the decision of Choor Singh, J. in *Re Pan (M) Industries Ltd. Tay Ah Kee & Anor.* v. *Central Provident Fund Bhd.*[9]

Finally as to the costs of these proceedings it is not irrelevant to make the following observations. The extension of the prohibitory order after the winding up order was made, was totally impermissible. Section 224 of the Companies Act made that very clear. Nevertheless it was periodically extended right up to October 19, 1984 with the intention and the result of being a stumbling block to any proposed sale by the Bank.

In their execution proceedings, Sin Min's advisors contended that with reference to the proceeds of the sale of the said land, the Bank was only entitled to be regarded as a secured creditor for the amounts covered by the 1st and 2nd Charges but not the Debenture. If this submission was sustained there would have been a surplus available to satisfy Sin Min's claim. Alternatively they may have thought that something was due to them for having to preserve the said land before it was put beyond the reach of the Company's creditors.

In their desperation to do right the Bank came to Court for directions but here again they found themselves fiercely opposed by Sin Min. But it was now submitted that the Receiver could only pay the loan secured by the Debenture but not those secured by the two charges.

The path to hell is said to be paved with good intentions and so far as the facts of this case are concerned, however nobly motivated Sin Min may have been, I have not been able to discover anything in the documents which precluded the Bank from applying the proceeds of the sale to the satisfaction of all their debts from this Company subject only to the statutory priorities as aforesaid.

The rule is that costs must follow the event and I see no reason to depart from it here.

In all the circumstances I give judgment for the Applicant and I make the following orders:

1. that within 14 days hereof the Applicant do comply with section 4 of the Powers of Attorney Ordinance 1949 with regard to the Power of Attorney contained in the Debenture;
2. that thereafter the Receiver be at liberty to sell the said land together with the building thereon in accordance with the terms of the Debenture and convey the same to the purchaser;
3. that upon completion of the sale, the Receiver do notify the Official Liquidator of the amount realised in the sale and manner in which it is proposed to distribute the same;
4. that in the absence of being notified of the existence of any statutory priorities which in law are entitled to take precedence, the Receiver be at liberty to pay the proceeds of the sale after deduction of the costs of the Bank and the Receivers in the manner provided in the Debenture towards satisfaction *pro tanto* of the debts of the Company to the Bank as secured creditors under the 1st Charge, the 2nd Charge and the Debenture;
5. that the surplus, if any, be paid to the Liquidator;
6. that the costs of these proceedings be taxed and paid by Sin Min and finally;
7. that the party have general liberty to apply for any further or other orders required to work out the direction herein before contained.

After this Judgment was delivered, but before

the Court rose, Mr. Tan for the Bank pointed out that the Debenture had in fact been deposited with the Registrar of this Court and Mr. Ong clarified his earlier submission that the Power of Attorney had not been registered, by stating that what he meant was that the Bank had not registered the instrument appointing Mr. Roland Choong as Receiver and consequently it was ineffective to create any power of attorney in him. Mr. Tan has produced the Debenture for inspection of this Court and I have noted that it was deposited on December 27, 1980.

But the Bank's instructions in writing appointing Mr. Roland Choong as Receiver on March 18, 1983 was only lodged with the Registrar of Companies pursuant to section 186 of the Act. After reciting that the Bank had appointed him to be a Receiver pursuant to the powers conferred upon the Bank by Clause 9 of the Debenture, the instrument reads:

"And we hereby appoint the said Roland Choong Shin Cheong to be our true and lawful substitute to execute in our name or his name any conveyance or assignment or other instruments and to deliver any deed or deeds and to effect any registration and to do all such other things as may be necessary to vest any property sold by the said Roland Choong Shin Cheong as such receiver in the purchases thereof."

It is this document which Mr. Ong now says is invalid for non-compliance with section 4 of the Ordinance.

The point raised is an interesting one because by Clause 13 of the Debenture, the Company only irrevocably appointed the Bank to be its attorney albeit with power to the Bank to substitute the Receiver for the time being in their place and stead to be attorney of the Company. In my view this document is also a general power which requires to be deposited in the manner provided by section 4 of the Ordinance. If Mr. Roland Choong wishes to execute any conveyance in the name of the Company, it follows that section 4 of the Ordinance must be complied with in regard to the instrument of his appointment.

The need for a dual compliance with section 4 by the deposit of the original Debenture and then the instrument appointing the Receiver could have been avoided if Clause 13 of the Debenture had been drafted to provide for the irrevocable appointment not only of the Bank but also of any Receiver appointed by it to be the attorney of the Company. Provided the formula in the instrument creating the power of attorney is so worded as to identify the donee of the power with due certainty, that would appear to be enough.

Looking again at the Orders which I have made, it does not appear to me necessary that there should be any variation of its terms. The Receiver can still sell and the Bank can execute the transfer. Of course, if the Receiver wishes to execute section 4 of the Ordinance must first be complied with. I order accordingly.

Order accordingly.

Solicitors : *Tan & Tan; L.M. Ong & Co.*

WOODLAND DEVELOPMENT SDN. BHD. v. CHARTERED BANK; P.J.T.V. & DENSUN (M) SDN. BHD. (Third Party)

[O.Cr.J. (Gunn Chit Tuan J.) July 6, 1985]

[Kuala Lumpur – Civil Suit No. 215 of 1975]

Banking – Banker collecting 'Account Payee' crossed cheque for a third party – Cheques crossed account payee in favour of plaintiffs – Whether Banker guilty of negligence – Bills of Exchange Act, 1949, s. 85.

Company Law – Doctrine of constructive notice – Ordinary directors having no authority from the company – Company not bound.

In this case Woodland Development Sdn. Bhd. (plaintiff in the present case) were payees of three cheques for $10,000, $50,000 and $10,000 respectively. The first cheque was crossed generally, the last two cheques were crossed with the words 'Account Payee'. One Kim Chean Han director of the plaintiff handed over these cheques to Richard Seow and Yap Yoke Min for opening an account in the name of the plaintiff in a Petaling Jaya Bank. All the three persons were directors of the plaintiff as well as P.J.T. V. & Densun (M) Sdn. Bhd. (third party). The third party had an account with the Chartered Bank, Petaling Jaya Branch – (defendants in the present case). The two directors, to whom the cheques were given instead of opening an account in the name of the plaintiff persuaded the manager of the defendant bank to collect the amount for the third party. The present action was brought by the plaintiff against the defendant Bank and the third party for conversion and alternatively for money had and received for their use.

Held: (1) the defendant bank was negligent in collecting cheques for the third party and were liable for conversion or alternatively for money had and received. The defendant bank was asked to return the said amount of $70,000 with interest to the plaintiff;